APPENDIX C

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF DISSEMINATION OF INDIVIDUAL CUSTOMER PROPRIETARY NETWORK INFORMATION BY TELECOMMUNICATIONS CARRIERS.	DOCKET NO. RT-00000J-02-0066

QWEST CORPORATION'S NOTICE OF FILING CPNI COMMENTS

Qwest Corporation ("Qwest") hereby respectfully submits the attached comments in response to Ernest G. Johnson's Memorandum of February 15, 2002, soliciting comments from interested parties on the Arizona Corporation Commission's investigation into CPNI. Qwest takes very seriously its obligations with respect to customer information, as well as the concerns of the Commission and Qwest customers with respect to that information. Qwest welcomes the opportunity for further discussion of these issues with the Commission and all interested parties. In addition to these attached comments, Qwest also incorporates by reference its previous letters to the Commission and the Attorney General on CPNI[1] and comments made at the Open

[1] The following letters have been sent by Qwest to the Commission or to the Attorney General, of which the Commissioners received copies: 1) Letter dated January 14, 2002 from James A. Smith to Attorney General Janet Napolitano; 2) Letter dated January 14, 2002 to Chairman Mundell, and Commissioners Irvin and Spitzer from Teresa Wahlert; and 3) Letter dated February 6, 2002 to Chairman Mundell from Teresa Wahlert.

Meetings held on this issue.[2] Qwest also requests through its undersigned counsel to be placed on the formal service list for this proceeding.

Respectfully submitted this 29th day of March, 2002.

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ORIGINAL and 10 copies of the foregoing hand-delivered for filing this 29th day of March, 2002 to:

Docket Control
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_____

[2] Open meetings on this issue were held on January 16, 2002 and January 28, 2002.

Qwest's Response to Staff's Questions on February 15, 2002

Qwest respectfully submits these comments in response to the questions posed by Staff on February 15, 2002 concerning customer information issues. Qwest takes very seriously its obligations with respect to CPNI as well as the concerns of this Commission and Qwest's customers with respect to that information. Even before there existed federal legislation in this area, Qwest's tradition was to treat this information confidentially and to protect it from unauthorized uses. Qwest welcomes the opportunity to meet with the Commission and other interested parties and to discuss these issues further at the Commission's convenience.

1. The following questions relate to the adoption of an Opt-In policy for use of CPNI as opposed to an Opt-Out policy:

a. Does your company currently share CPNI with other affiliated entities?

Yes, as permitted under federal law. Qwest may share CPNI with affiliated entities[1] as permitted by 47 U.S.C. § 222(d), which allows carriers to use CPNI without additional customer approval for the initiation, rendering, billing and collection for service; the protection of property; or the provision of inbound telemarketing, referral, or administrative services with customer approval for the duration of the call. CPNI may also be used without additional customer approval when required by law. *Id.* at § 222(c)(1). Moreover, under the Federal Communications Commission (FCC) CPNI rules, CPNI may be shared among affiliates under a "total service" approach. 47 C.F.R. §§ 64.2001, *et seq*. Under this approach, a carrier offering telecommunications services may use CPNI associated with its provision of services to offer its customers telecommunications services in the same category, and to offer related products and services such as customer premises equipment (CPE) and information services. 47 C.F.R. § 64.2005. Carriers may also use CPNI to provide "services necessary to, or used in, the provision of . . . telecommunications service, including the publication of directories." *See* 47 U.S.C. § 222(c)(1)(B). Additionally, if a customer purchases services from more than one of Qwest's business units or companies, those businesses may share between or among themselves the CPNI generated from that customer's purchases to offer additional services in either service category. In such instances, customer approval is inferred based on the customer's purchasing behavior from each service category.

[1] 47 C.F.R. § 64.2003(a) defines an "affiliate" as "an entity that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another entity." Some examples of Qwest affiliates that meet this definition are Dex, Qwest Wireless, etc.

Does your company use an opt-in or opt-out policy for CPNI sharing?

Qwest has used both. With respect to uses of CPNI, beyond those described above in 1.a., Qwest used both opt-in and opt-out notifications for CPNI use under prior federal Open Network Architecture ("ONA") rules (*see* discussion below in response to Question 1(b)) and at least one time since the passage of the Telecommunications Act of 1996 ("Act" or "1996 Act"). More recently, Qwest adopted an opt-out process, which Qwest has suspended pending a ruling by the FCC in its CPNI docket.

When did you implement this policy?

Qwest used an opt-out policy for businesses with less than 20 lines under the FCC's previous (no longer existing) ONA CPNI rules. This practice was in effect from the time the ONA CPNI rules were adopted through the promulgation of new rules by the FCC in 1997 under 47 U.S.C. § 222. Since the passage of § 222 and the FCC's new CPNI rules, Qwest used an opt-in notification once (from around August of 1998 to April 1999) and an opt-out notification once (December, 2001).

Please provide a copy of the notice that your company sent to its Arizona customers.

Attached is a copy of the Qwest's (then U S WEST) opt-in notice, which was included on the back of customer bills from August 1998 to April 1999. (Attachment 1) Also attached is a copy of the December, 2001 opt-out bill insert. (Attachment 2)

If you have used an opt-out policy, please provide any data you may have regarding the percentage of customers which opted out and identify the costs associated with administering an opt-out policy.

Qwest data is provided in Confidential **Attachment 3.** Associated costs identified with CPNI in Arizona are greater than approximately $800,000, and consist primarily of costs associated with service representatives' processing labor and time, bill inserts, voice response development, and system changes.

b. Prior to the Tenth Circuit Decision which vacated portions of the FCC rules, did your company share CPNI with other affiliated entities?

Yes, CPNI was shared as permitted under the FCC's ONA CPNI rules prior to its adoption of new CPNI rules under § 222. Those ONA rules allowed the use of CPNI across Qwest's business operations to sell enhanced services and CPE. After the enactment of §222 and the FCC's post-§222 rules (which the FCC held displaced its prior ONA CPNI rules), Qwest shared CPNI with affiliates as described above in response to Question 1.a.

Prior to the enactment of § 222, Qwest (then U S West) as a Bell Operating Company ("BOC"), was bound by the FCC's previous ONA CPNI rules. Those rules required that: (1) affirmative

customer approval ("opt-in") be secured before using the CPNI of large businesses (defined as customers with 20 lines or above) in the sale of enhanced services or CPE; and (2) an opt-out approval mechanism be used with respect to business customers with less than 20 lines for CPNI use in the same context. The FCC's rules allowed CPNI of residential customers to be used without any expression of approval beyond that assumed from the carrier-customer relationship. The FCC found that most mass-market customers would not be concerned by the use of CPNI by carriers in the context of communicating with customers about enhanced services or CPE. The FCC's rules at the time contained separate requirements with respect to sharing CPNI with cellular affiliate. Such sharing was restricted and conditioned on non-discrimination obligations (*i.e.*, if sharing occurred with the affiliate, CPNI sharing had to be available to other requesting entities). *See* 47 C.F.R. § 22.903(f).

Did your company use an opt-in policy as required by the FCC rules?

Yes. Under the no-longer effective ONA CPNI rules, Qwest used an opt-in policy for customers with more than 20 lines. After the passage of § 222 and the FCC's rules, Qwest also used an opt-in CPNI approval process briefly during the 1998-99 timeframe. Based on a prior CPNI affirmative approval trial (addressed in Attachment 4). Qwest neither anticipated nor received a high volume of responses. (At Attachment 5, Qwest also provides a set of slides associated with a follow-up conversation with the FCC regarding the significance of the reported numbers of individuals consenting to the use of their CPNI and those opposing such use.)

Please provide any data you may have regarding the percentage of customers opting in and the costs associated with administering an opt-in policy.

Qwest's experiences with "opt in" are limited to its ONA CPNI experience, its trial, and its limited 1998-99 attempts to secure affirmative approvals. Information about the ONA opt-in approvals and the opt-in approval solicitation during 1998-99 is confidential information at Attachment 6. As demonstrated by Attachments 4 and 5, costs associated with attempts to secure affirmative approvals are beyond any rational cost/benefit analyses and would be impossible for a business to recoup. Each attempt simply continues to escalate the "cost per consent obtained." As an absolute matter, it is impossible – regardless of the actual cost – to spend enough to secure affirmative approvals from a large base of customers. *See Paul H. Rubin and Thomas M. Lenard*, Privacy and the Commercial Use of Information, Boston: The Progress & Freedom Foundation and Kluwer Academic Press, 2002, at 72 (referencing testimony submitted to the Federal Trade Commission by a witness to the effect that when a default approval mechanism was opt-in, 85 percent of consumers chose not to provide personally-identifiable information. In contrast, 95 percent chose to allow use of such information when the default was opt-out. The authors conclude that requiring opt-in would dramatically reduce the amount of information available to the commercial sector and would impose substantial costs on consumers).

Qwest hereby submits for inclusion in the record a recent report entitled "The Hidden Costs of Privacy: The Potential Economic Impact of 'Opt-In' Data Privacy Laws in California," by Peter A. Johnson and Robin Varghese, January 2002 as Attachment 7. Although this report was confined to only certain businesses and a single state, it is indicative of the kinds of cost burdens (particularly those associated with search costs and service inefficiencies) that would be realized by businesses in other contexts should an opt-in requirement for use of customer information be imposed.

See also Fred H. Cate, *Principles of Internet Privacy*, 32 Conn. L. Rev. 877, 883 (2000) ("information on the characteristics of consumers . . . has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services [and is] essential to the functioning of an advanced information based economy such as ours," quoting from Federal Reserve Board Chairman Alan Greenspan).

c. **Please identify any competitive concerns associated with the use of an opt-out versus an opt-in policy. If there are competitive concerns associated with an opt-out policy, please identify them with specificity and describe how any adverse competitive impacts would actually occur.**

Qwest can identify three competitive concerns. First, as set forth above, restrictions on the free flow of information hinder the ability of carriers to compete through formulating and targeting offers to particular consumers. Indeed,

> The courts have consistently recognized that capitalizing on informational efficiencies such as those permitted by . . . vertical integration . . . is not the sort of conduct that harms competition. . . . It is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers.[2]

Second, to the extent restrictive regulations are applied to some carriers but not others, the carriers subject to the restrictions will be placed at a competitive disadvantage relative to the carriers who are not subject to the restrictions.[3] Third, because customers may choose their

[2] Brief of FCC at 49, in *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (*SBC v. FCC*) (Nos. 94-1637, 94-1639) (*citing Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986), which the FCC described as a case involving "a natural gas distribution monopolist [that] used its residential gas customer list to target advertising of its new 'vent damper' products") Attachment 8; *see also, SBC v. FCC*, 56 F.3d at 1495.

[3] AT&T has argued that "public benefits and legitimate efficiencies" result from this use of sharing CPNI among affiliates, including the ability "to offer . . . customers the ability to engage in 'one-stop shopping' for their telecommunications needs." *See* AT&T's and McCaw's Opposition to Petition for Reconsideration, at 2, File No. ENF-93-44, Attachment 9. AT&T/McCaw characterized arguments by carriers (including some BOCs other than Qwest)

carriers based in part on competing carriers' CPNI policies, processes and procedures, competition between carriers may be affected by the choices these customers make with respect to opt-in, or opt-out or other CPNI issues.

d. Is the "implied consent" assumed by an opt-out policy consistent with the language of Section 222 of the Federal Act?

Yes. As the statute itself provides, and as the FCC has held customer approval to use CPNI for certain purposes is either presumed by § 222 (*e.g.*, subsection (c)) or dispensed with altogether (*e.g.*, subsection (d)). An opt-out CPNI approval mechanism actually goes one step further in providing notice of a carrier's anticipated CPNI sharing practices and extending to individuals the ability to reject the proposals. In such circumstance, a failure to act in opposition to the projected uses may be deemed to confer consent, and as confirmed by the Tenth Circuit, is the only constitutional means by which the government may mandate the obtaining of consent. *See U S WEST, Inc. v. FCC,* 182 F. 3d 1224 (10th Cir. 1999) (*"U S WEST"*). The failure to act most likely reflects either a general position of comfort or one of unconcern. It might also represent inertia born out of the fact that the proposal is simply not important to the person reviewing it. *See* Attachment 10 (letter of Kathryn Marie Krause to FCC dated December 2, 1996 concerning the role and scope of implied consent). But in all events, "implied consent" is sufficient customer approval under § 222, as such consent

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who sought to ban such sharing as "naked protectionist pleas to prevent competition for the business of their existing customers." AT&T asserted that arguments seeking to ban its CPNI sharing were "astonishing claims that [carriers] should be immunized from competition that benefits consumers." *Id.* at 6. AT&T continued:

> [C]ourts have uniformly held that it is pro-competitive and beneficial for consumers for multi-product firms to offer each of their competitive products to each of their customers – and restrictions on the ability of integrated firms to do so are anticompetitive.

The FCC agreed with AT&T, as did the D.C. Circuit Court of Appeals. The Court of Appeals characterized the argument opposing CPNI sharing as follows:

> [The argument is] not that the Commission's decision -- here, its refusal to impose the [ban on CPNI sharing] -- will hurt competition or otherwise adversely affect the public interest, but instead that it will hurt [the opponent of the FCC's position] by increasing the sting of competition it will face from the . . . company [using the CPNI]. We agree with the Commission . . . that AT&T/McCaw's ability to market its services directly to the customers of other carriers [using CPNI] . . . should lead to lower prices and improved service offerings.

SBC v. FCC, 56 F.3d 1484, 1494-95.

> inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights. . . [I]mplied consent is not constructive consent [but, rather] "consent in fact" which is inferred "from surrounding circumstances[“] . . . [I]mplied consent -- or the absence of it -- may be deduced from "the circumstances prevailing" in a given situation.

Griggs-Ryan v. Smith. 904 F.2d 112, 116-17 (1st Cir. 1990) (citations omitted).

Implied consent through opt-out notifications is utilized in other federal statutory structures where the information being shared or disclosed is more sensitive than CPNI. For example, opt-out communications are utilized under the *Gramm-Leach-Bliley* (*GLB*) law. They are used with respect to sharing of viewing category information under the Video Privacy Act. 18 U.S.C. § 2710(b)(2)(d). And limited customer information about cable subscribers can be made available to others if an opportunity to opt-out is extended. *See* Qwest Opening Brief at FCC, Attachment 11, pointing out the similarity of structure and language between the Cable Privacy Act and § 222(c).

Please identify any harms associated with "implied consent" for release of individually identifiable CPNI collected by telecommunications carriers.

There are no material harms associated with allowing CPNI sharing among affiliated entities under an implied consent approval regime. There is little, if any, **demonstrable** harm associated with disclosure of CPNI to third parties under the circumstances that typically attend its disclosure (*e.g.*, contractor or agency relationships, joint marketing agreements, sales of portions of businesses, appropriate contractual restrictions, etc.)

e. Do you agree with the Tenth Circuit's finding that communications between telecommunications carriers and their affiliates, divisions and employees constitute "commercial speech" for First Amendment purposes?

Yes. *See* Qwest's Reply Brief in the Tenth Circuit case:

> [T]he [FCC's opt-in] CPNI rules have a prohibitive effect on CPNI-related communications within a telecommunications carrier, and within the carrier's corporate family: employees in different divisions, affiliates, and personnel within the same carrier will not be able to engage in related speech about certain customers because prior affirmative consents will, in the vast majority of cases, be difficult or impossible to obtain. For example, Mary Sue in the landline division is prohibited from talking to Linda May in the wireless division about customer John Jones and his possible interest in receiving information.

Attachment 12, Reply Brief at 4. The fact that sharing of CPNI may occur through an electronic communication rather than through an employee's mouth is of no legal consequence. The

communication is protected speech.[4] A ban on such communication, resulting from an individual's failure to affirmatively approve it, obviously impacts such speech. *See also* Solveig Singleton, cited by U S West in its Opening Brief to the Tenth Circuit, Attachment 11. ("The view that information such as the purchaser's name, address, and buying habits should not be recorded and transferred without his consent conflicts with the general rule that facts and ideas, including our names and addresses, remain free for all to collect and exchange. Attempts to restrict the transfer of information thus run headlong into our rights to free speech.")

f. Does a consumer's privacy interest in CPNI rise to a level such that there is a substantial state interest in its protection?

As the Tenth Circuit Court of Appeals stated, "[t]he breadth of the concept of privacy requires [courts] to pay particular attention to attempts by the government to assert privacy as a substantial state interest." *U S WEST,* 182 F. 3d at 1234.

Privacy interests must always be balanced against other interests, including free speech rights, because privacy protection "imposes real costs on society." *Id.* at 1235, n. 7, *citing* to Fred H. Cate, Privacy in the Information Age 19-30 (1997). Among these costs are the "withholding of relevant true information" and the

> interfer[ence] with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy [protection] may lead to reduced productivity and higher prices for . . . products or services.

Id.

The Tenth Circuit identified a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information.

Early in its opinion, the court stated that "Given the sensitive nature of some CPNI, such as when, where, and to whom a customer places calls," Congress afforded CPNI the highest level of privacy protection under § 222." *U S WEST,* 182 F. 3d at 1229, n. 1. The court was comparing § 222(c) with other subsections of § 222, such as the provisions dealing with aggregated

[4] *See also United Reporting Company v. Los Angles Police Dept* , 146 F.3d 1133 (9th Cir. 1998), *rev'd sub nom Los Angeles Police Dept. v. United Reporting Company,* 528 U.S. 32 (1999). The Ninth Circuit decision reflects questions about whether speech not directly incorporated into commercial solicitations is commercial speech or some higher form of speech. 146 F.3d at 1136-37. However, the Court proceeded to analyze the case under a commercial speech standard. While the Ninth Circuit found that there was a substantial government interest in withholding the names and addresses of arrestees from commercial solicitors, it also held that the challenged statute failed to advance that government interest in a direct and material manner (*id.* at 1139-40). The Supreme Court reversed the Ninth circuit on the grounds that the government, as the entity in possession of the arrestee information, could determine to whom and under what circumstances the information should be disclosed. It did not address the matter of government interference with speech between private entities based on information lawfully in the possession of one of those entities.

information. The Court was commenting on the fact that, in the former case, customer "approval" was necessary before a carrier could use CPNI; whereas with respect to aggregate information, no such "high[ ] level of privacy protection" was provided for in the statute. Nor was such protection required in the case of subscriber list information (SLI), as the Court observed. By describing this legislative framework, the Tenth Circuit was not validating a substantial state interest in protecting people from disclosure of such information, particularly not if the disclosure were pursuant to customer approval. Qwest also respectfully directs the Commission's attention to the following statement of the Tenth Circuit Court:

> In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment or misappropriation of sensitive personal information for the purposes of assuming another's identity.

U S WEST, 182 F. 3d at 1235.

Assuming that protecting sensitive information were a substantial government interest, the government regulation will fail nonetheless to sustain scrutiny unless it materially and directly advances that interest. The Tenth Circuit found that an opt-in CPNI approval regime failed this requirement because "[w]hile protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, [it had] no indication of how it may occur in reality with respect to CPNI." *U S WEST,* 182 F. 3d at 1237.

Please identify any other substantial state interests involved?

In its decision invalidating the FCC's opt-in requirement, the Tenth Circuit rejected the FCC's suggestion at oral argument that there existed a government interest in protecting people from telemarketing that could appropriately be accomplished through restrictive CPNI rules.

Even if protecting persons from "privacy invasions" associated with marketing contacts amounted to a "substantial" state interest, the government has already provided a remedy to alleviate any privacy harm associated with the telemarketing activity. Federal law requires the establishment and maintenance of Do Not Call Lists. *See* 47 U.S.C. § 227 and 47 C.F.R. § 64.1200. Qwest's Arizona tariffs further provide that Qwest make available to its a residential customers a "no solicitation" listing at an approved monthly rate. *See* Qwest's Exchange and Network Services Price Cap Tariff, Section 5.7.1.K. Under this tariff, customers may choose to have a symbol displayed in the white pages directory, which alerts callers that the listed customer does not wish to received telephone calls or mail designed for solicitation purposes. *Id.*

g. Does the Fact that the Arizona constitutional right to privacy has been interpreted more broadly than the Federal Constitution support the adoption of an opt-in policy in Arizona?

No. As a preliminary matter, the Arizona constitutional right to privacy has only "been interpreted more broadly than the Federal Constitution" in the context of search and seizure cases. More fundamentally, Arizona courts have consistently found that this constitutional provision applies only to intrusions by the *government* or where there is state action. The right may not be asserted as against or between private parties. *See Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 947 P.2d 846 (App. 1997). Finally, state laws, whether in the form of a statute or state constitution are preempted by the FCC's regulations in this area. As the FCC stated in a portion of its CPNI Order (at ¶ 20), that was not challenged on appeal:

> State rules that likely would be vulnerable to preemption would include . . . state regulations that sought to impose more limitations on carriers' [CPNI] use. This is so because . . . state rules that sought to impose more restrictive regulations would seem to conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information . . . [T]he balance would seemingly be upset and such state regulation thus could negate the Commission's lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

h. Is an opt-out policy sufficient to protect the substantial state interests involved in protecting people from the disclosure of sensitive and potentially embarrassing personal information?

Qwest believes that an opt-out policy is sufficient to address any consumer privacy interests involving customer information. This is particularly true in light of the fact that **additional** judicial and regulatory mechanisms are available to protect individuals from any actual carrier misuse of CPNI.

First, Arizona recognizes various independent causes of action for interference with privacy, as set forth in the Restatement of Torts and Prosser. *See Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989). Under Section 652D of the Restatement Second, a cause of action exists for giving unreasonable publicity to another's private life. This remedy allows private parties to protect their own interests through access to the courts. Second, unlike many businesses, customers believing carriers have engaged in unreasonable practices may utilize easy and extensive complaint and alternative dispute resolution processes through both formal and informal methods at the Commission. *See* A.R.S. §§ 40-241 through -250; and A.A.C. R14-2-510, R14-3-101 through -112.

Finally, not only is an opt-out CPNI approval regime consonant with the First Amendment (as less restrictive than an opt-in model), but it is supported by additional less restrictive

"mechanisms" that also act to promote the protection of individuals' privacy interests. Rather than stopping the flow of information (*i.e.,* CPNI transfers), Do Not Call lists control the downstream marketing communications by curbing such speech to those specific persons who decline to receive it.

i. How would an opt-in policy alleviate concerns identified with the release of individually identifiable CPNI?

Qwest respectfully submits that an opt-in requirement is unnecessary as a policy matter and prohibited by the First Amendment as a legal matter.

Is an opt-in policy sufficiently narrowly tailored to overcome any First Amendment concerns or should the Commission consider a more flexible opt-in policy?

Even with respect to specific types of information (e.g., call detail) or specific speech contexts (e.g., sharing with unaffiliated third parties), the government may not restrict speech more than is necessary to accomplish a legitimate governmental objective. An opt-in policy fails to meet this requirement, because the interest in privacy can be protected through an opt-out policy. (Of course, a business on its own initiative is always free to curtail its own conduct by not sharing certain types of information or not sharing information in certain contexts. Qwest has done precisely that for years, operating in a fashion that protects the confidentiality of information about its customers and refusing to provide CPNI to unaffiliated parties for their own marketing uses.)

j. Does your company disclose CPNI to any non-affiliated companies? Under what circumstances would you release CPNI to a non-affiliated company?

Yes, in limited circumstances and with appropriate protections for the confidentiality of the information. *See* Attachment 13.[5] Qwest has also filed comments with the FCC stating that there are situations in which sharing CPNI with an unaffiliated entity would be appropriate (e.g., a sale of part of Qwest's business; a jointly marketed product or opportunity).

k. Please comment on Arizona Revised Statutes Section 40-202(C)(5) and the importance of it with regard to any rules that the Commission adopts.

The statute authorizes the ACC to adopt rules that would provide that notwithstanding any other law, customer information, account information and related proprietary information are

[5] Attachment 13 is Qwest's response to the Arizona Attorney General (February 7, 2002, page 1). Qwest there advises that it "does not and will not disclose CPNI to telemarketers or other third parties for their own independent use. Qwest does hire marketing firms to sell Qwest products and services when it makes sound business sense to contract the function out . . . Qwest's use of CPNI in these instances (through its agents) comports with applicable law regarding the use of CPNI."

confidential unless specifically waived by the customer in writing." A.R.S. § 40-202. The application and interpretation of the statute are, like any other statutes, subject to the Arizona and Federal Constitutions, and federal laws and rules.

l. Would an opt-in policy result in additional benefits to consumers relative to an opt-out policy? Explain in detail why or why not.

Most consumers are "pragmatists," weighing the benefits to them from the fair use of information with the use itself.[6] For the most part, these consumers are inclined to allow information use, especially within the relationship that gave rise to the information.

Attached to this filing for inclusion in the record is a survey conducted by Dr. Alan Westin, *Public Attitudes Toward Local Telephone Company Use of CPNI*: Report of a National Opinion Survey Conducted November 14-17, 1996, by Opinion Research Corporation, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, sponsored by Pacific Telesis Group. (Attachment 14, Westin Survey.) (Dr. Westin's credentials are outlined as an attachment to the Survey documents as "Privacy Activities of Professor Alan F. Westin, Columbia University." Notable among his achievements is his long-standing tenure in the area of privacy and information policy as witnessed by his award winning book, Privacy and Freedom in 1967.) The survey provides demonstrable evidence that:

- Despite a generalized concern over privacy issues, a large majority of the public believes it is acceptable for businesses, and in particular local telephone companies, to communicate with their own customers to offer them additional services,[7] especially if those not wishing such communications are provided with an opt-out opportunity.[8]

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[6] *See* Letter from Privacy & Legislative Associates (Dr. Alan Westin and Robert Belair) to the FCC, dated January 23, 1997, at 2, note 2 ("Privacy & Legislative Associates Letter"), Attachment 15. The population can be fairly characterized as comprised of "privacy unconcerned" (about 16%), "privacy fundamentalists" (about 24%) and "privacy pragmatists" (approximately 60%). "Privacy pragmatists" generally tend to favor the benefits extended to them by the free flow of information, but are swift to react when they think that information policies or uses are unfair. *See also* "Hidden Costs" at 7 note 1, referencing Michael Turner and Robin Varghese, Understanding the Privacy Debate. New York: ISEC 2001 and stating that "Turner and Varghese suggest there may be a large discrepancy between those who have privacy concerns based on 'fundamental' principles and those who are concerned about privacy for pragmatic reasons. Among the latter, a significant portion of privacy pragmatists may include those who express a desire to control access to personal data but are not willing to invest the time or energy to ensure compliance."

[7] *Westin Survey,* Question 7 (businesses generally), Question 9 (local telephone companies); Analysis at Item 7.

[8] *Id.,* Question 8 (businesses generally), Question 12 (local telephone companies); Analysis at Item 8.

- In particular, a large public majority believes that it is acceptable for local telephone companies to communicate with their customers using CPNI data.[9] "Majorities in favor of local telephone company use of customer information for marketing were registered for all the demographic subgroups that make up the general public: young, middle-aged, and older persons; lowest to highest incomes; black, white, and Hispanic; male and female; lowest to highest education; conservative, moderate, and liberal political philosophy; urban, suburban, and rural community dwellers; and by Northeast, North Central, South, and West regions."[10] The availability of an opt-out procedure brings initial approvals of local telephone company use of CPNI from the two-out-of-three respondent level up to the 80% range of public approval.[11]

- Individuals understand "notice and opt-out" procedures, and many have used them in one context or another.[12]

- Hispanics, African-Americans, women, young adults (18-24 years of age), persons who have used an opt-out previously, and persons who order many additional telephone services, all have an higher-than-average level of interest in receiving information about new services from telecommunications carriers.[13]

Since the universe of "privacy constituents" contains a large segment of consumers with pragmatic approaches to privacy issues and protections it is a burden on consumers to drive privacy and information policy to the demands of those most concerned, ignoring the vast majority of the population who have little concerns when information is used fairly and along expected or anticipated lines. This is true with respect to CPNI use, as well, since it is reasonable to assume that those most concerned with privacy are those most vigilant to protect their own personal privacy.

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[9] *Id.*, Questions 10-11.
[10] *Id.*, Analysis at Item 10, p. 9.
[11] *Id.*, Questions 11-12; Analysis at Items 8-10, pp. 8-10.
[12] *Id.*, Question 5 (familiarity with notice-and-opt-out), Question 6 (actual use of notice-and-opt-out); Analysis at 9-10 ("The CPNI survey found the respondents who have used opt outs in other business settings are willing to change their position from initial disapproval to positive views of customer-records-based communications by local telephone companies when" follow-up questions are asked).
[13] *Id.*, Questions 9-11; Analysis at 9.

m. Is the CPNI data collected by telecommunications companies different from the personal data collected by companies in other industries (e.g., banks)?

As Qwest stated in its Opening Brief to the Tenth Circuit:

> To telecommunications carriers, including local exchange, long distance, and wireless carriers, CPNI is comparable to the information that credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and many other firms maintain about their customers' purchasing and usage characteristics, as part of their routine business operations.

Attachment 11 at page 3. Among those types of information, CPNI is less sensitive than much of it. *See* Attachment 15, Privacy & Legislative Associates Letter at 2-8. The letter states:

> CPNI is not as sensitive as other personally identifiable information such as medical record information, financial and credit record information, insurance information, employment performance information and other categories of personal information which provide insight into an individual's performance or condition or provide information regarding sensitive personal relationships.

Id. at 3. It continues:

> In calculating the sensitivity of categories of personal information, it is important and customary to evaluate the relational interest in which the information is created and used, including the extent to which there is an existing relationship between the individual about whom information is collected and the information collector; the degree of trust between the individual about whom information is collected and the information collector; and the extent to which there is an expectation that the information will be kept confidential.

Id. at 6. The letter concludes that the relationship between carrier and customer does not rise to the level of as critical "privacy sensitivity" as does, for example, the relationship between doctor and patient. *Id.* at 18.

> **If so, do those differences provide support for an opt-in policy as opposed to an opt-out policy? Explain in detail why or why not.**

Given that financial data is more sensitive than CPNI and such data can be shared pursuant to an opt-out regime, CPNI sharing and releases should not be burdened by a more onerous approval process. For example, under the *GLB,* a financial institution generally may not disclose non-public personal information to non-affiliated entities about its customers and/or consumers (two different categories of constituents), unless it has provided notice and, as appropriate, extended an opportunity to opt-out. Although financial institutions are required to provide notice in order to share nonpublic personal information with companies with whom they have joint marketing

agreements, they are not required to extend an opt-out option provided that the use of such nonpublic personal information by the joint marketing partner is confined by contract to the joint marketing activity.

n. Would an opt-in policy result in any additional costs to telecommunications providers relative to an opt-out policy? Explain in detail what the source of the additional costs would be, if any.

Yes. An opt-in policy would result in insurmountable (and unwarranted) costs for carriers seeking affirmative CPNI approvals. *See* response to Question 1.b, *supra*. It is clear that due to inertia no amount of expense would be enough to secure affirmative approvals in sufficient numbers to allow a carrier to make practical or effective use of information to formulate and market offers designed to meet customers' individual needs.

Additionally, the information presented in this filing regarding expenses associated with an opt-out regime may be understated because they represent an educated but not in-depth analysis of such costs.

o. What is the difference in customer response likely to be if an opt-in policy is used instead of an opt-out policy? Explain in detail the basis for your answer, citing any studies that support it.

Essentially an opt-in CPNI approval policy means that CPNI approvals will not be secured from a large enough number of customers for a carrier to be able to use CPNI in its commercial marketing efforts. An opt-out approval mechanism does not create that kind of barrier to speech. *See* response to Question 1.a and 1.b *supra*.

p. Would an opt-in policy create any logistical or administrative problems for telecommunications companies relative to an opt-out policy? Explain in detail the basis for your answer.

See response to Question 1 *supra*.

2. The following questions relate to the content and format of the notice telecommunications companies provide to their customers regarding CPNI:

a. Do the issues regarding such notice change substantially if an opt-in policy is used instead of an opt-out policy? Please explain in detail.

Qwest agrees that opt-out notices should be clear and conspicuous. The FCC rules include requirements for opt-out notices that are sufficient. 47 C.F.R. § 64.2007(f).

b. Should notice be provided in multiple languages? If so, what languages should the notice be provided in?

It is in the interest of carriers to consider the demographic make-up of a carrier's customer base in determining the languages associated with the communication any CPNI notice. For example, Qwest provided its December 2001 opt-out notice in both English and Spanish.

c. Should rules be adopted to regulate the form that such notice should take, e.g. should the notice be required to be on a separate page, should a specific font size be required, etc.? If so, what should the requirements of such a rule be? Please explain and support your answer in detail.

No. The Commission should not adopt rules concerning the form of the CPNI opt-out notice. Carriers should be free to craft notices as they deem appropriate for their customer base. The federal rule outlining elements that are required for a CPNI notification have sufficient safeguards to protect consumers. *See* response to Question 2.a.

d. Should rules be adopted to regulate the content of such notice? If so what should be required? Please explain and support your answer in detail.

No. The Commission should not adopt rules regarding the content of CPNI opt-out Notices. The government is not free to dictate the contents of a carrier's communications with its customers. Any governmental insinuation regarding the text of the communication must pass constitutional muster as outlined in U S WEST. That standard is stringent. Qwest does not believe the ACC could meet such burden.

e. Should rules be adopted that standardize the title and labeling of such notice? If so what should be required? Please explain and support your answer in detail.

No. *See* response to Question 2.d, above.

f. Is the CPNI data collected by telecommunications companies different from the personal data collected by companies in other industries (e.g., banks)? If so, do those differences provide support for imposing different noticing requirements for telecommunications companies than those faced by companies in other industries? Explain in detail why or why not.

CPNI is less sensitive than much of the information collected by other industries. *See* response to Question 1.m, above. Even information associated with retail purchasing can prove embarrassing if the person associated with the information was engaging in activity that deviated from the "norm."

3. The following questions relate to how often telecommunications companies should be required to provide notice of CPNI issues:

a. For existing customers how often should telecommunications companies send notice of their CPNI policies if an opt-in system is used? If an opt-out system is used? Please explain your answer in detail.

Notices should be sent out only once to a carrier's existing customer base and once to persons who subsequently become new customers. Valuable resources are consumed in sending out periodic notices (not the least of which is paper). So long as a CPNI notice can be secured by an individual upon request after the initial CPNI notice has been sent out, and so long as a customers have easy access to the Company's policies on use of information, customer privacy concerns are adequately addressed.

b. For new customers when should telecommunications companies send notice of their CPNI policies if an opt-in system is used? If an opt-out system is used? Please explain your answer in detail.

CPNI notices would most likely become a part of carrier's welcome packages (providing service and customer care information) to new customers. If, a customer signs up for services on line, there may be an on-line CPNI notice for such customers.

c. For customers that are terminating service with a given company is any notice of CPNI policies necessary if an opt-in system is used? If an opt-out system is used? If so, explain in detail what is necessary and why it is necessary.

So long as carriers advise their existing customers about how the carrier might use CPNI if or when a customer that terminates service with the carrier (for example, including information in the CPNI notice about using CPNI for winback purposes or including the information in the carrier's database for product design or development activities in the future), no further notice to customers is necessary. *And see* response to Question 4.a., *below*.

4. The following questions relate to the responsibilities telecommunications companies should have for CPNI data of former customers:

a. If a customer terminates service with a given company should the company be obliged to destroy that customers CPNI data? Explain in detail why or why not.

CPNI should be handled according to a carrier's record keeping, archiving and destruction systems that are crafted to handle all kinds of data, including confidential data. No "special" rules should be set up for CPNI. Carriers should be permitted to use CPNI to design and market offers to remaining or prospective customers, including customers who at the time of such use do not subscribe to the carrier's services.

b. If a customer terminates service with a given company should the company be permitted to use that customers CPNI data to market to that customer? That is, should companies be permitted to use CPNI data in win-back efforts? Explain in detail why or why not.

Yes, CPNI can be used in win-back efforts with former customers. Carriers may market services from categories out of which these ex-customers originally purchased before they terminated such service. The FCC's rules expressly permit such use. 47 C.F.R. § 64.2005(b)(1) and the Commission is not authorized to reach a contrary conclusion.

c. If a customer terminates service with a given company should the company be permitted to use that customers CPNI data for any purpose? Explain in detail what should and should not be allowed and why?

A carrier should still be permitted to use CPNI associated with its former customers for aggregating, modeling, prediction, etc. -- all activities associated with database marketing activities. *See* responses to Questions 3.c and 4.a. Additionally, CPNI should also remain available to the carrier for § 222(d) purposes and other purposes by law.

5. The following questions relate to the verification telecommunications companies provide to their customers that have opted in or opted - out:

a. If an opt-out system is used, should companies be required to provide notice to their customers that they have successfully opted-out? Should companies be required to provide notice to their customers that they have not chosen to opt-out? Explain in detail why or why not.

Carriers should not be required to verify or confirm customer CPNI approval decisions. Although carriers might volunteer to do such confirmations (as Qwest did earlier this year), the government should not impose such verifications, particularly in the absence of any meaningful cost/benefit analysis.

As a preliminary matter, Qwest believes that the costs of verification would not be trivial and would lack any overall "public interest" benefit. The "harm" to an individual if CPNI is "accidentally" or "inappropriately" used is that the person may be approached via a marketing contact. The "cost" associated with verifying/noticing thousands of individuals to prevent this limited, personal "harm" is unwarranted. Conversely, the Commission should only require carriers to verify/confirm customer choices if an individual agrees to bear the cost of the verification or notification.

b. If an opt-in system is used, should companies be required to provide notice to their customers that they have successfully opted-in? Should companies be required to (or allowed to) provide notice to their customers that they have not chosen to opt-in? Explain in detail why or why not.

No. *See* response to Question 5.a, above.

c. For either an opt-in or opt-out system, should rules be adopted to govern the form of verification notices? If so, what should be required? For example, should verification be required to be in writing or telephonic verification acceptable? Explain and justify your answers in detail.

Qwest does not support a verification requirement. *See* response to Question 5.a. Should verification nevertheless be mandated, carriers should be permitted to chose the method. For any particular customer, this may be through e-mail, telephone verification, or written communication. Qwest used all these methods with respect to the verification efforts it voluntarily undertook with respect to actions taken regarding the December 2001 bill insert.

d. For either an opt-in or opt-out system, should rules be adopted to govern the content of verification notices? If so, what should be required? Explain and justify your answers in detail.

No. *See* response to Question 5(c).

6. What obligations should telecommunications companies have regarding CPNI data for customers who have opted-out (or not opted-in)?

CPNI safeguards are already in place. Under the FCC's safeguard rules, 47 C.F.R. § 64.2009, carriers have obligations with respect to training their employees on how CPNI can/cannot be used. This would also require training on what a customer did/did not choose with respect to CPNI. Carriers are also required to have supervisory overview of employees' activities with respect to CPNI, including marketing campaigns, and officers are expected to make certifications regarding CPNI rule compliance. These safeguards are quite sufficient to safeguard CPNI data whether a customer has expressed approval for CPNI use through either an opt-out or an opt-in method.

7. The following questions relate to the sharing of CPNI data with affiliates or non-affiliates:

a. Should there be restrictions placed on the entities that telecommunications companies can share CPNI data with?

No. As a general matter, there should be no restrictions on CPNI access, use, and disclosure beyond those found in § 222, and rules similar to those enacted by the FCC.

For example, should companies be permitted to sell CPNI data to outside entities or should the sharing of CPNI data be limited to affiliates?

Certainly, sharing CPNI with affiliates should be permitted with customer approval, unencumbered by any additional government interference. Even with respect to unaffiliated entities, to the extent the carrier discloses CPNI in situations that are not extraordinary (such as when it provides CPNI to agents or contractors with appropriate contractual provisions on protection of data and restrictions on use) or where carriers can demonstrate their actions fall within a § 222(d) exception, are required by law, or are supported by customer approval, disclosure should not be prohibited.

Does 47 U.S.C. Section 222 permit CPNI sharing with non-affiliates under any circumstances? Provide detailed justification for your answer.

See response to Question 7(a) above. 47 U.S.C. § 222(d) includes certain exceptions that Qwest believes would support limited CPNI disclosure to non-affiliated entities. Such disclosure would also be permitted if required by law or if supported by customer approval. *Id.* at 222(c).

b. If telecommunications companies profit from the sale of CPNI data should there be a requirement that they share those profits with the customers who have opted-in or not opted-out? For example, should such customers receive discounts?

No. In terms of traditional notions of "ownership," CPNI belongs to the carrier, not to the customer.[14] The fact that CPNI pertains to the purchasing characteristics of customers does not give those customers a property interest in the information. Personal data like telephone numbers, addresses, social security numbers, and medical history -- let alone records of purchases and economic transactions -- are almost always owned by someone else: the Post Office, the government, a bank, or a physician or hospital. A surveillance camera outside a bank or department store may capture the image of persons entering or leaving the establishment without their permission. The resulting footage belongs to the bank or the store, not to the customers, even though their images are depicted in it. In the same way,

> [a] data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data. It is the often substantial investment that is necessary to make data accessible and useful, as well as the data's content, that the law protects.

Fred H. Cate, Privacy in the Information Age 74 (1997).

[14] If a third party were to break into a carrier's computers and steal CPNI, it would be the carrier (and not individual subscribers) who would have a cause of action for theft or conversion.

c. Should there be any restrictions on how CPNI data is used by affiliates of telecommunications companies? If so, what are they and how could such requirements be enforced? Justify your answer in detail.

Qwest respectfully refers the ACC to its responses above.

d. Should there be any restrictions on how CPNI data is used by non-affiliates of telecommunications companies? If so, what are they and how could such requirements be enforced? Justify your answer in detail.

Under federal law, carriers are prohibited from making CPNI available to unaffiliated third parties for their own independent use, absent a written request from a customer under § 222(c)(2) or customer approval. No additional government restrictions are necessary regarding how CPNI is used by non-affiliates of carriers for the same reasons as outlined throughout these comments.

8. Besides an all-inclusive opt-out or opt-in policy, is there merit to a partial opt-in policy? That is, is there merit to requiring an opt-in policy for some categories of customers but allowing an opt-out policy for other categories? Explain in detail why.

The market, rather than the government, should decide which approval process should be used for CPNI.